Alaska's Cap on Noneconomic Damages: Unfair, Unwise and Unconstitutional

As part of the 1986 tort reform, the Alaska Legislature placed a limit of $500,000 on the amount a victim could recover in noneconomic damages in any action based upon negligence. The limit was intended to help alleviate what was considered to be a crisis in the affordability and availability of liability insurance. Although the Alaska Supreme Court has yet to assess the constitutionality of the $500,000 limit, similar provisions have been challenged on various constitutional grounds in several other states. This note examines the case law from other jurisdictions and assesses how it might impact the Alaska Supreme Court's evaluation of the constitutionality of Alaska's damages limitation. This note concludes that the cap violates both the equal protection and the right to jury trial clauses of the Alaska Constitution.

I. INTRODUCTION

During the mid-1980's, nearly every state adopted some sort of tort reform. The avowed purpose of these initiatives was to alleviate the perceived crisis in personal injury litigation. State legislatures expressed concern about the decreasing availability and rising cost of liability insurance.[1] The theory behind the various reforms was relatively simple: By restricting the rights of victims to recover for their injuries, insurance companies would not be required to pay as much in settlements and jury verdicts. The legislature believed this restriction would allow the liability insurance industry to lower premiums, and, as a result, the general public would benefit as health care would become more affordable

1. *See, e.g.*, W. VA. CODE § 55-7B-1 (Supp. 1993) (stating that "in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers and the injured without the full benefit of professional liability insurance coverage").

and municipalities would be able to provide traditional services without being driven into bankruptcy.[2]

The Alaska Legislature in 1986 passed its version of tort reform, a statute entitled "Limitations on Civil Liability."[3] The first section of this statute limits the amount of noneconomic damages a plaintiff can recover for an injury based upon negligence to $500,000.[4] The Alaska Supreme Court has yet to rule on the constitutionality of this provision, but the question will undoubtedly arise in the future.

This note, in part II, first examines some of the problems that Alaska trial courts have faced in attempting to apply the damages limitation provision. Part III surveys case law from other jurisdictions that have ruled on the constitutionality of similar tort reform statutes. Part IV analyzes some of the constitutional challenges to the damages cap provision and examines how the Alaska Supreme Court will likely assess these challenges. The note concludes by recommending that Alaska Statutes section 09.17.010 be struck down as violative of both the equal protection and right to jury trial guarantees of the Alaska Constitution.

II. DIFFICULTY PRESENTED BY THE APPLICATION OF ALASKA STATUTES SECTION 09.17.010

As noted above, the Alaska Supreme Court has yet to rule on the constitutionality of the Alaska Statutes section 09.17.010. Lower courts that have faced the issue of when to apply the statute have not established a consistent standard or approach for interpreting the damages cap provision. One problem encountered is the interpretation of the exception: "The [$500,000 noneconomic damages cap] does not apply to damages for disfigurement or severe physical impairment."[5] By failing to define "disfigurement or severe physical impairment," the legislature has engendered confusion among the lower courts, causing them to reach disparate and unpredictable decisions.

---

2. *See, e.g.*, COLO. REV. STAT. § 13-64-102 (Supp. 1993) ("The general assembly determines and declares that it is in the best interests of the citizens of this state to assure the continued availability of adequate health care services to the people of this state by containing the significantly increasing costs of malpractice insurance for medical care institutions and licensed medical care professionals . . . .").

3. ALASKA STAT. § 09.17 (Supp. 1993).

4. *Id.* § 09.17.010. Noneconomic damages are defined as "compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other nonpecuniary damage." *Id.*

5. *Id.* § 09.17.010(c).

Two superior court opinions, *Pleasant v. Navistar International Transportation Corp.*[6] and *Vanderpool v. Red Devil Corp.*[7] illustrate such confusion. In *Pleasant*, the jury found, by way of a special interrogatory, that the plaintiff had suffered "disfigurement or severe physical impairment" and awarded $2.4 million in noneconomic damages.[8] Nonetheless, the defendant maintained that the award should be reduced to the $500,000 limit because the jury's special finding was advisory only.[9] Unpersuaded by this argument, the court found that the evidence supported the jury's finding of "disfigurement or severe physical impairment" and refused to apply the $500,000 cap.[10]

Conversely, in *Vanderpool* the court granted the defendant's motion for judgment notwithstanding the verdict on the issue of "severe physical impairment" and reduced the jury's award of noneconomic damages to $500,000.[11] The court concluded that the plaintiff's injuries did not amount to "severe physical impairment" and that reasonable minds could not differ on this issue.[12] Yet, the plaintiff's injuries in *Vanderpool* were not unequivocally less severe than those sustained by the plaintiff in *Pleasant*. Indeed, the injuries at issue in the *Vanderpool* case were arguably more severe.

In *Pleasant*, the plaintiff experienced some double vision, but he could eliminate it by wearing glasses and would eventually be able to learn to suppress it naturally.[13] Just six weeks after the accident, the plaintiff had returned to work.[14] Moreover, a friend of the plaintiff testified that he could not discern any difference in the behavior or physical condition of the plaintiff after the accident.[15] Despite this description of the plaintiff's condition, the court specifically stated that the evidence supported the jury's finding of disfigurement or severe physical impairment.[16]

In *Vanderpool*, the plaintiff injured his knee and ribs in a backhoe accident.[17] The knee injury was severe enough that

---

6. No. 4BE-88-007 Ci. (Alaska Super. Ct. Sept. 24, 1993).
7. No. 4BE-91-178 CIV. (Alaska Super. Ct. Jan. 27, 1993).
8. *Pleasant*, slip op. at 22.
9. *Id.* at 23.
10. *Id.* at 24.
11. *Vanderpool*, slip op. at 8.
12. *Id.*
13. *Pleasant*, slip op. at 23.
14. *Id.* at 22.
15. *Id.* at 23.
16. *Id.* at 24.
17. *Vanderpool*, slip op. at 6.

strenuous physical activity periodically caused pain and swelling.[18] The court characterized the rib injury as chronic, since two of the ribs had not joined.[19] The court also noted that, as a result of the injuries, the plaintiff could no longer lift objects heavier than forty pounds or conduct "the physical activities associated with a subsistence lifestyle."[20] Nevertheless, the court held that, by definition, these injuries did not constitute "severe physical impairment."[21]

As the *Vanderpool* and *Pleasant* opinions illustrate, the "disfigurement and severe physical impairment" exception to the $500,000 limit on noneconomic damages has created confusion at the trial court level, producing inconsistent and unpredictable decisions. The problem stems in part from the legislature's lack of guidance to the courts in how to define "disfigurement and severe physical impairment." Without such direction, courts have applied different criteria in making this determination. For example, the court in *Vanderpool* referred to Alaska Statutes section 11.81.900(b)(51), a criminal statute that provides for a more severe penalty in cases where the convicted defendant has caused a "serious physical injury" to a victim,[22] for guidance in interpreting the meaning of "severe physical impairment."[23] That statute defines "serious physical injury" as "serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that [which] unlawfully terminates pregnancy."[24] Although the *Vanderpool* court decided after trial that the damages cap should be applied, it had originally reached the opposite conclusion and denied the defendant's motion for a directed verdict on the issue.[25] In denying the defendant's motion, the court concluded that reasonable minds could differ as to whether the plaintiff's injury amounted to "severe physical impairment."[26] The court based its ruling in large part upon the definition of "serious physical injury" found in Alaska Statutes section 11.81.900(b)(51).[27]

---

18. *Id.* at 6-7.
19. *Id.* at 6.
20. *Id.* at 7.
21. *Id.* at 8.
22. ALASKA STAT. § 11.81.900(b)(51) (Supp. 1993).
23. *Vanderpool*, slip op. at 2.
24. ALASKA STAT. § 11.81.900(b)(51) (Supp. 1993).
25. *Vanderpool*, slip op. at 3.
26. *Id.* at 2.
27. *Id.* at 2-3.

After trial, however, the court reversed its position and granted the defendant's motion for judgment n.o.v., stating that it was improper to consider the definition provided in the criminal statute because the legislature adopted it for a different purpose than the tort reform legislation.[28] Thus, the two statutes "differ substantially and require differing interpretations of 'severe physical impairment' and 'serious physical injury.'"[29] The *Vanderpool* court's reconsideration of the issue illustrates just how much confusion the exception clause of the damages cap has created. The lack of consistency regarding the same issue, in the same case, in the very same court, casts doubt on the likelihood of consistency among the various trial courts.

It is not surprising, therefore, that the court in *Pleasant* adopted a different approach. The *Pleasant* court never looked to other legislative enactments for guidance, instead submitting to the jury a special interrogatory on the question of whether the injury could be characterized as "disfigurement or severe physical impairment."[30] It is unlikely, however, that such a determination, through a special interrogatory, would end the inquiry in a large portion of cases. Presumably the court would retain the power to find that reasonable minds could not differ as to the severity of the injury and apply the damages cap anyway.

Perhaps one could defend the legislature for failing to precisely define "disfigurement or severe physical impairment" by arguing that a determination regarding the severity of a claimant's injury is inherently subjective. Such an argument, however, only underscores the unworkable condition of Alaska's noneconomic damages limitation. Moreover, one of the purposes of Alaska Statutes section 09.17 was "to reduce the costs associated with the tort system."[31] Ironically, however, the exception clause in Alaska Statutes section 09.17.010(c) has created a new battleground for litigation, only consuming additional judicial resources. In sum, the additional litigation that the statute has created, as well as the inconsistent and unpredictable outcomes that the "disfigurement or severe physical impairment" exception has engendered, provide strong ammunition for either a due process or equal protection challenge to Alaska Statutes section 09.17.010.[32]

---

28. *Id.* at 3.

29. *Id.*

30. Pleasant v. Navistar Int'l Transp. Corp., No. 4BE-88-007 Ci., slip op. at 1 (Alaska Super. Ct. Sept. 24, 1993).

31. COMMITTEE (FINANCE) SUBSTITUTE FOR ALASKA S. 377, 14th Leg., 2d Sess. § 1(e) (1986).

32. The erratic outcomes caused by the exception provision illustrate the arbitrariness of the statute. Under Alaska law, a statute must be "reasonable not

III. AN OVERVIEW OF CONSTITUTIONAL CHALLENGES TO STATUTORY CAPS IN OTHER JURISDICTIONS

The majority of states enacted some type of tort reform in the 1980's. In 1986 alone, the same year in which the state legislature passed Alaska Statutes section 09.17, more than thirty other states adopted some type of tort reform.[33] Many of these tort reform packages contain provisions that place a cap on total damages, economic and noneconomic combined, while others limit only noneconomic damages. The constitutionality of these caps has been challenged in virtually every state except Alaska.[34] Many courts that have reviewed such statutes have struck them down as violative of due process, equal protection, right to jury trial or as a denial of access to the courts.[35] Conversely, some courts have upheld the caps on the ground that they are rationally related to the state's legitimate goal of lowering liability insurance rates.[36]

A. Equal Protection

A common argument raised by those challenging the constitutionality of damages caps has been that such caps violate the constitutional guarantee of equal protection. The damages limitations create two distinct classifications: victims who suffer injuries valued at less than the cap and those whose damages exceed the

---

arbitrary." State v. Wylie, 516 P.2d 142, 145 (Alaska 1973). *See infra* part IV.A.

33. Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 628 (1988).

34. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991); Scholz v. Metro. Pathologists, P.C., 851 P.2d 901 (Colo. 1993); Pfost v. State, 713 P.2d 495 (Mont. 1986), *overruled on other grounds by* Meech v. Hillhaven W., Inc., 776 P.2d 488 (Mont. 1989); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Trujillo v. City of Albuquerque, 798 P.2d 571 (N.M. 1990); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991); Condemarin v. University Hosp., 775 P.2d 348 (Utah 1989); Robinson v. Charleston Area Medical Ctr., 414 S.E.2d 877 (W. Va. 1991).

35. A typical "open courts" provision reads as follows: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." FLA. CONST. art. I, § 21. Some courts have held that such provisions create a right to have meaningful access to the courts and that damages limitations violate this right. Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987); Kansas Malpractice Victims v. Bell, 757 P.2d 251 (Kan. 1988); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988). The Alaska Constitution, however, does not contain an "open courts" provision.

36. *See, e.g.*, Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985).

cap. Individuals in the former group receive full compensation for their injuries, while those in the latter group do not.[37]

In assessing an equal protection claim, a court must first determine the appropriate level of scrutiny. Very few courts have applied the highest level of scrutiny—the strict scrutiny test—to a damages cap statute.[38] The debate has largely been over whether to apply the lowest level of scrutiny—the rational basis test[39]—or the intermediate standard.[40] As a preliminary matter, courts must decide whether the right to recover full monetary compensation for tortious injury is a "substantial" or "important" right, or if it is merely an ordinary right. If it is deemed an ordinary right, a "statutory limitation on recovery is simply an economic regulation,

---

37. Additionally, some of the statutes that apply only to medical malpractice actions or to lawsuits against a governmental entity create a further classification: individuals who are injured due to the negligence of a health care provider or a governmental entity are denied full recovery, while other tort victims are not. *See, e.g.*, COLO. REV. STAT. § 13-64-302 (Supp. 1993) (limiting recoverable damages in medical malpractice actions to $1 million total, of which a maximum of $250,000 may be for noneconomic loss); N.M. STAT. ANN. § 41-4-19 (Michie Supp. 1993) (limiting liability of government entity or public employee acting within the scope of duties to $600,000 for damage to or destruction of property; $300,000 for past and future medical expenses; $400,000 for all damages other than property damages or medical expenses to one person; and $750,000 for all claims other than medical expenses arising out of a single occurrence).

38. *See, e.g.*, Pfost v. State, 713 P.2d 495 (Mont. 1986), *overruled on other grounds by* Meech v. Hillhaven W., Inc., 776 P.2d 488 (Mont. 1989). Under the strict scrutiny test, the state's interest advanced by the statute must be compelling, and the classification must be necessary to achieve the state's goal. A court will apply this test only if the statutory classification infringes upon a fundamental right or involves a suspect class. The Supreme Court has declared the following rights to be fundamental: freedom of expression and association, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); right of procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); right to interstate movement, Shapiro v. Thompson, 394 U.S. 618 (1967); right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); and right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965). Suspect classes include race, Hunter v. Erickson, 393 U.S. 385 (1969), and national origin, Oyama v. California, 332 U.S. 633 (1948).

39. This test requires that there be a reasonable relationship between the classification that the statute creates and the objective that the statute seeks to achieve. McGowan v. Maryland, 366 U.S. 420 (1961).

40. The U.S. Supreme Court has applied the intermediate level of scrutiny to evaluate classifications based upon gender. Under this standard, the classification created by the statute "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190 (1976); *accord* Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977).

which is entitled to wide judicial deference."[41] Because very few states have constitutional provisions that specifically forbid limits on recovery for personal injuries,[42] some courts, deeming the right of a tort victim to be fully compensated worthy of a heightened degree of scrutiny, have looked to other, more general constitutional provisions. For example, in *Pfost v. State*,[43] the Montana Supreme Court relied on the "speedy remedy" provision of the state's constitution to apply a strict scrutiny test.[44] Other courts have relied on the history of the common law in their jurisdiction. For example, in *Trujillo v. City of Albuquerque*,[45] the New Mexico Supreme Court applied the strict scrutiny test, commenting that "[t]he right to recover monetary damages for tortious injury has played a vital role in New Mexico since before the time of statehood."[46] Therefore, even if there is not a constitutional provision that guarantees the right to recover monetary damages for tortious injury, courts may apply a heightened level of scrutiny when restrictions are placed on this right.

The level of scrutiny utilized is critically important, as virtually any statute will be upheld under the rational basis test. Courts applying this standard almost always defer to the legislature's determination that the classification created by the statute is rationally related to a legitimate state objective. In *Scholz v. Metropolitan Pathologists, P.C.*,[47] for instance, the Colorado Supreme Court refused to consider the contention raised by the plaintiff that the cap on noneconomic damages had been ineffective in reducing insurance rates and lowering the cost of health care. The court explained:

> The [damages cap statute] was enacted in 1988 in response to legislative findings which indicated severe problems concerning health care availability due to the rising costs of insurance premiums in Colorado. . . . [I]t is reasonable to assume that the sometimes unpredictable and large damages that are awarded for noneconomic injuries contribute to the rising cost of malpractice insurance and thus, operate to limit the availability of health care services. Consequently, the concerns that prompted the General Assembly to pass the [act], as expressed in the declaration of

41. Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 531 (Va. 1989).

42. *See, e.g.*, ARIZ. CONST. art. 18, § 6.

43. 713 P.2d 495 (Mont. 1986), *overruled on other grounds by* Meech v. Hillhaven W., Inc., 776 P.2d 488 (Mont. 1989).

44. MONT. CONST. art. III, § 6 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character . . . .").

45. 798 P.2d 571 (N.M. 1990).

46. *Id.* at 574.

47. 851 P.2d 901 (Colo. 1993).

> intent as well as the legislative history of the act, reasonably support the passage of the act. *The wisdom and effectiveness with which the [act] might remedy the concerns sought to be addressed are, of course, not questions which this court will entertain, for "we do not sit as a 'super legislature' to weigh the propriety of . . . legislation."*[48]

Thus, if a court applies the rational basis test, it will not likely reexamine the legislative findings upon which the statute is based.

Conversely, under an intermediate scrutiny approach, the court will evaluate whether the statute accomplishes what it set out to achieve and whether the legislature accurately assessed the situation that existed when the statute was enacted. In *Moore v. Mobile Infirmary Ass'n*,[49] for example, the Alabama Supreme Court examined various studies to determine if the damages cap effectively reduced the cost of medical malpractice insurance.[50] The court noted that the size of damage awards was only one of several factors that influences the cost of malpractice insurance and that there was not a consensus that damages caps were effective in reducing insurance premiums.[51] Concluding that "the correlation between the damages cap . . . and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote"[52] and that the cap imposed a direct burden upon the severely injured, the court held the limitation to be unconstitutional.[53]

In *Carson v. Maurer*,[54] the New Hampshire Supreme Court, like the Alabama Supreme Court in *Moore*, maintained that an inquiry into the effectiveness of the statute in reducing the cost of insurance was proper under an intermediate level of scrutiny.[55] Skeptical that the damages cap at issue would have the effect intended by the legislature, the court reasoned that, "'[f]irst, paid-out damage awards constitute only a small part of total insurance premium costs. Second, and of primary importance, few

---

48. *Id.* at 907 (alteration in original) (citation omitted) (emphasis added).

49. 592 So. 2d 156 (Ala. 1991).

50. *Id.* at 167-68 ("To permit the legislature to act as the sole arbiter of such juxtaposition, would be to vacate our judicial role.").

51. *Id.*

52. *Id.* at 168.

53. *Id.* at 170.

54. 424 A.2d 825 (N.H. 1980).

55. *Id.* at 830. The court stated that the right to recover damages for personal injury was "an important substantive right" and that the statute should therefore "be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test." *Id.; see also* Jones v. State Bd. of Medicine, 555 P.2d 399 (Idaho 1976) (remanding for additional factfinding to determine if the statute had been successful in lowering the cost of liability insurance).

individuals suffer noneconomic damages in excess of [the cap].'"[56] This approach varies slightly from that in *Moore*. The *Moore* court relied primarily on studies that showed there had not been a reduction in insurance rates in jurisdictions with damages caps in place. The *Carson* court, on the other hand, looked at the legislature's theory behind the cap and found it to be unpersuasive. Thus, the *Carson* approach was prospective, while the *Moore* approach was more retrospective.[57]

While the *Carson* and *Moore* courts employed a means-end test and focused on the effectiveness of the damages cap in lowering malpractice insurance rates, other courts have been asked to examine evidence that shows the absence of a crisis in their state. As noted previously, state legislatures have justified statutory limitations as an emergency measure mandated by an insurance availability and cost crisis.[58] Under an intermediate level of scrutiny, however, courts will often consider whether there was an actual crisis when the legislation was passed. In *Arneson v. Olson*,[59] for example, the North Dakota Supreme Court pointed out that the number of malpractice claims in the state was far below the national average and that insurance premiums were the sixth lowest in the nation.[60] Based on these findings, the court concluded that there was not a crisis of availability or cost in North Dakota and that the statute, therefore, violated the state's equal protection guarantee.[61]

Similarly, in *Trujillo v. City of Albuquerque*,[62] the New Mexico Supreme Court maintained that it was necessary to review statistical evidence in order to determine whether the statute was constitutional under an intermediate level of equal protection

---

56. *Id.* at 836 (quoting R. Scott Jenkins & Wm. C. Schweinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 951 (1979)).

57. The different approaches can probably be attributed to the fact that *Carson* was decided in 1980 and *Moore* in 1992. In 1980, less data was available to assess the effectiveness of statutory limitations on recovery. Thus, the *Carson* court had to look at the premise upon which the reform was based and analyze its soundness. By contrast, the *Moore* court was able to draw upon numerous studies conducted during the 1980's which showed that the damages caps had not been as effective as many legislatures had anticipated.

58. *See, e.g.*, CAL. CIV. CODE § 3333.2 (West 1993).

59. 270 N.W.2d 125 (N.D. 1978).

60. *Id.* at 136.

61. *Id. See* N.D. CENT. CODE § 26-40.1-01 (1977) (repealed 1983); N.D. CONST. art. I, § 21; art. IV, §§ 43, 44.

62. 798 P.2d 571 (N.M. 1990). The New Mexico damages cap applied only to lawsuits against a government entity. *See supra* note 37.

scrutiny.[63] The court's analysis in *Trujillo*, however, focused on whether there were alternative methods of accomplishing the goals of the statute that were less restrictive of individual rights.[64] Applying this "less restrictive alternative" approach, the court remanded the case for a factual determination of whether such options existed.[65] The *Trujillo* court stressed the importance of statistical evidence in determining the constitutionality of the statute:

> While it may be that in other cases this Court can assess whether a substantial nexus exists between legislative means and ends without the benefit of such an evidentiary record, here the government's putative goal inextricably is tied to the risk of large damage awards. *The existence, nature, and magnitude of this risk, as well as the justification for the means chosen to deal with it, ultimately depend on empirical data.*[66]

Thus, like the Alabama Supreme Court in *Moore*, the New Mexico Supreme Court was willing to examine evidence regarding the effectiveness of the statute in advancing the goal of the state.

In remanding the case, the court in *Trujillo* indicated that there was a strong possibility of alternative means to advance the objective of the State that were less restrictive of individual rights. The court explained that few people receive awards in excess of the cap, while the overwhelming majority of tort victims recover damages for less than the cap.[67] In such a case, the court indicated that "the state treasury would be better protected by allowing only those persons with claims over the present liability cap to recover, by limiting all persons with claims against the state to recovery of a certain percentage of their incurred damages or by some other means."[68] This "less restrictive alternative" emphasis makes *Trujillo* unique, even among intermediate scrutiny cases.

---

63. The test under this intermediate level of scrutiny was whether the cap "'was substantially related to [an] important governmental interest.'" *Id.* at 578 (quoting Richardson v. Carnegie Library Restaurant, 763 P.2d 1153, 1160 (N.M. 1988)).

64. *Id.* at 579-82.

65. *Id.* at 582.

66. *Id.* at 581 (emphasis added).

67. *Id.* at 581 n.8.

68. *Id.* This line of reasoning contradicts that of the California Supreme Court in Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985). The *Fein* court stated, "Nor can we agree with amicus' contention that the $250,000 limit is unconstitutional because the Legislature could have realized its hoped-for cost savings by mandating a fixed-percentage reduction of all noneconomic damage awards. The choice between reasonable alternative methods for achieving a given objective is generally for the Legislature . . . ." *Id.* at 683.

As the above discussion illustrates, in evaluating equal protection challenges to statutes that limit the recovery of damages, the decision of which level of scrutiny to apply is outcome determinative. If a court applies the rational basis test, the statute will usually be held constitutional because lowering the cost of liability insurance to keep health care affordable and to keep governmental entities solvent is clearly a legitimate state interest. Moreover, most courts will defer to the judgment of the legislature because the rational basis standard merely requires that "the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose."[69] Under this test, courts do not consider evidence that the statute is ineffective or that less restrictive alternatives were available to accomplish the same goal. Conversely, under an intermediate level of scrutiny, a court examines how well the statute achieves its stated purpose and, in some cases, whether the statute was necessary in the first instance. A statutory damages cap usually fails this heightened scrutiny test.

B. Substantive Due Process[70]

Although most courts that have invalidated damages-limiting statutes have relied on equal protection or right to jury trial provisions, other courts have opted for a due process analysis. In *Morris v. Savoy*,[71] for example, the Ohio Supreme Court, unwilling to strike down on equal protection grounds a $200,000 cap on general damages that could be awarded in medical malpractice actions, nonetheless held that the statute violated the state constitution's due process clause.[72]

Typically, however, courts that find legislation to be constitutional under an equal protection analysis will conclude that the legislation also passes the due process test.[73] This result occurs because "[s]ince 1937, the judicially articulated equal protection standard for reviewing most social and economic legislation has

69. Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983).

70. Although technically employing a due process analysis to scrutinize damages limitations provisions, the analyses of these courts bear great similarity to equal protection examinations. The due process analyses by these courts are of particular importance to potential challengers of the damages cap in Alaska, due to the similarity of the due process inquiry to Alaska's "sliding scale" approach to equal protection analysis. *See infra* part IV.A.

71. 576 N.E.2d 765 (Ohio 1991).

72. *Id.* at 771-72.

73. *See, e.g.*, Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

paralleled the due process standard."[74] As described above, the lowest level of equal protection scrutiny requires that there be a reasonable relationship between the classification that the statute creates and the objective that the statute seeks to achieve.[75] Similarly, under a due process analysis, the statute must "have a reasonable relation to a proper legislative purpose."[76] This similarity has allowed some courts to simultaneously reject both due process and equal protection challenges to statutory damages caps by applying essentially the same test to both claims.[77]

Despite this similarity, some courts view the two tests as significantly different. In *Condemarin v. University Hospital*,[78] for example, the Utah Supreme Court expressed its preference for the due process approach because, in the court's view, it offers greater flexibility than the equal protection analysis.[79] Under the equal protection approach, the level of scrutiny the court chooses to apply will almost always foreordain the outcome.[80] The court explained:

> The difficulty with the equal protection analysis . . . is that it does not account for what is or what should be actually going on in this Court's scrutiny of legislative abrogation of common law causes of action. Characterizing plaintiff's rights here as "non-fundamental" would virtually insure that the legislative action will be found constitutional under the rational basis standard. . . . [S]ome commentators and a number of courts have incorporated an intermediate or realistic level of scrutiny into their equal protection framework in order to achieve the flexibility needed to balance state interests against individual rights. I suggest that a more open, straightforward performance of the balancing function under the due process framework is in order.[81]

---

74. PAUL BREST & SANFORD LEVINSON, THE PROCESS OF CONSTITUTIONAL DECISIONMAKING 549 (2d ed. 1983).

75. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

76. Nebbia v. New York, 291 U.S. 502, 537 (1934).

77. *See, e.g.*, Robinson v. Charleston Area Medical Ctr., 414 S.E.2d 877 (W. Va. 1991). The court held that the statute passed the equal protection test because "the statute is rationally related to the legitimate state purpose." *Id.* at 886. In considering the due process challenge, the court explained that "courts ordinarily will not reexamine independently the factual basis for the legislative justification for a statute. Instead, the inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based." *Id.* at 887. Under such an approach, it is hard to conceive of any statute that could pass the equal protection test and then fail to meet the requirements of due process.

78. 775 P.2d 348 (Utah 1989).

79. *Id.* at 356-60.

80. *Id.* at 357. *See supra* part III.A.

81. *Id.* (footnote omitted).

Under its due process "balancing analysis," the court in *Condemarin* was able to scrutinize the recovery limitation provision in the Utah Governmental Immunity Act[82] much more closely than an equal protection rational basis test would allow. The approach allowed the court to "balance the weight of the governmental interest at stake against the countervailing importance of the individual rights being compromised."[83] To do so, the court first evaluated the significance of the right that the legislation infringed upon. The Utah Supreme Court then declared the right to receive compensation in a suit for personal injuries to be a "substantial property right."[84] This right stems from the "open courts" provision of the Utah Constitution, which provides that "[e]very person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law."[85]

The court then weighed this "substantial property right" against the interest of the state in preserving the public treasury. Because the right involved was "substantial," the *Condemarin* court placed the burden upon the state to show that the damages cap was necessary: "[B]efore the state is permitted to conserve those monies at the expense of seriously injured citizens, its citizens are entitled to a showing in the courts that a measure so drastic and arbitrary as a $100,000 cap on all damages is urgently and overwhelmingly necessary."[86] The court also expressed concern with the "crisis rationale" that the State used to justify the damages limitation.[87] It noted that, in times of crisis, individual rights are especially susceptible to unconstitutional infringement.[88] The court also found insufficient evidence to support the contention that the State's solvency was threatened: "There is no factual showing in the legislative history or the trial court that the recovery limitation is reasonably necessary for preservation of the public treasury."[89] Thus, applying its due process balancing test, the *Condemarin* court struck down the statute because the alleged benefits of the cap were outweighed by the right of the individual to be fully compensated for his injury.[90]

---

82. UTAH CODE ANN. § 63-30-34 (1993).

83. *Condemarin*, 775 P.2d at 358.

84. *Id.* at 360 (quoting Hunter v. North Mason High Sch., 539 P.2d 845, 848 (Wash. 1975) (en banc)).

85. UTAH CONST. art. I, § 11.

86. *Condemarin*, 775 P.2d at 363.

87. *Condemarin*, 775 P.2d at 362.

88. *Id.*

89. *Id.* at 363.

90. *Id.* at 364.

In *Morris v. Savoy*,[91] another noteworthy due process case, the Ohio Supreme Court adopted a similar approach. Although the court held that the statute at issue, which limited damages for medical malpractice to $200,000,[92] did not violate the equal protection provision of Ohio's constitution, the court held that it did violate due process.[93] Under the equal protection analysis, the court applied the "rational basis" test because the right involved was not fundamental.[94] According to this standard, the court, in deference to the legislature, would uphold the statute "'if there exists any conceivable set of facts under which the classification rationally furthered a legitimate state objective.'"[95] The court then concluded that, "[a]ssuming the existence of a crisis in the medical malpractice insurance area," the statute did not violate the equal protection guarantee of the State.[96]

The court reasoned, however, that the due process provision of the state constitution required more. In its due process analysis, the *Morris* court had to "determine whether the method employed [by the legislature] bears a 'real and substantial relationship' to public health or welfare or whether it is 'unreasonable or arbitrary.'"[97] In order to make such a determination, the court examined whether the legislation was achieving its intended purpose, reducing medical malpractice insurance rates.[98] Similar to the conclusion of the *Condemarin* court, the *Morris* court found no evidence to show that the $200,000 cap on damages affected medical malpractice insurance rates.[99] Accordingly, it held that the statute did "not bear a real and substantial relation to public health or welfare" and, thus, was a violation of due process.[100]

C. Right to Jury Trial

The Seventh Amendment to the United States Constitution protects the right to trial by jury in civil actions.[101] The constitu-

---

91. 576 N.E.2d 765 (Ohio 1991).

92. OHIO REV. CODE ANN. § 2307.43 (Baldwin 1992).

93. *Morris*, 576 N.E.2d at 770-72.

94. *Id.* at 769-70.

95. *Id.* at 770 (citation omitted) (quoting Denicola v. Providence Hosp., 387 N.E.2d 231, 234 (Ohio 1979)).

96. *Id.* at 771-72.

97. *Id.* at 770.

98. *Id.* at 770-71.

99. *Id.* at 771.

100. *Id.*

101. U.S. CONST. amend. VII. The amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved, and no fact tried by a jury, shall be otherwise re-examined

tions of all but two states contain a similar guarantee.[102] Critics of damages caps contend that a determination of the amount of damages is an issue of fact and, as such, is within the exclusive province of the jury.[103] Other courts disagree, however, asserting that, while the determination of damages is part of the fact-finding duty of the jury, the remedy provided, the actual award, is a matter of law.[104]

In interpreting the right to jury trial, courts look to the common law as it existed when the constitution was adopted.[105] All state courts that have considered right to jury trial challenges to statutory limitations on damages agree that, at the time their state adopted the constitution, the assessment of damages was part of the jury's role.[106] Additionally, these courts concur that the jury set damages awards for pain and suffering.[107] Courts disagree, however, on the extent to which the legislature may place limits on the role of the jury.

Courts that have struck down damages caps as violative of the right to jury trial have acknowledged that the legislature can

---

in any Court of the United States, than according to the rules of the common law." *Id.*

102. Colorado and Louisiana are the two exceptions. Colorado's constitution does provide a right to jury trial, COLO. CONST. art. II, § 23 ("The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law."), but the Colorado Supreme Court has held that this section does not guarantee a right to trial by jury in civil cases. *See, e.g.*, State Farm Mut. Auto. Ins. v. Broadnax, 827 P.2d 531 (Colo. 1992) (en banc) (upholding statute requiring binding arbitration of personal injury protection benefits disputes).

103. *See, e.g.*, Kansas Malpractice Victims v. Bell, 757 P.2d 251, 258 (Kan. 1988) (The court stated that "[t]he right to jury trial, then, turns on the type of remedy sought. It would be illogical for this court to find that a jury, empaneled because monetary damages are sought, could not then fully determine the amount of damages suffered.").

104. *E.g.*, Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

105. *See, e.g.*, Sofie v. Fibreboard Corp., 771 P.2d 711, 716 (Wash. 1989) (en banc).

106. *E.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 159 (Ala. 1991); *Etheridge*, 376 S.E.2d at 529; *Sofie*, 771 P.2d at 716.

107. *See, e.g.*, Samsel v. Wheeler Transp. Servs., 789 P.2d 541, 551-52 (Kan. 1990). Some courts have pointed out that for damages which are not subject to precise calculation, such as damages for pain and suffering, the jury's role is even more essential. The Washington Supreme Court stated, "'[I]n cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.'" *Sofie*, 771 P.2d at 717 (quoting Dimick v. Schiedt, 293 U.S. 474, 480 (1935)); *see also Moore*, 592 So. 2d at 160.

modify the right to a jury trial and enact measures that shape litigation.[108] Thus, the legislature may allocate burdens of proof and enact rules of evidence and procedure.[109] These courts also have reasoned that the legislature can modify the common law so long as it provides an adequate substitute remedy for the right infringed.[110]

The essential question that most courts consider is "whether the function of the jury has been impaired."[111] In *Sofie v. Fibreboard Corp.*,[112] the Washington Supreme Court focused on the word "inviolate" in the state's constitutional guarantee that "[t]he right of trial by jury shall remain inviolate."[113] The court defined the term as "'free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact.'"[114] Based on this definition, the court concluded that "[f]or such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its *essential guarantees*."[115] Because the determination of the quantum of damages was clearly an essential role of the jury when the constitution of Washington was adopted and because Washington's damages cap interfered with the determination of the amount of damages by the jury, the *Sofie* court struck it down.

The Alabama Supreme Court followed this same line of reasoning in *Moore*:

> The relevant inquiry is whether the function of the jury has been impaired. Because the right to a jury trial "as it existed at the time of the Constitution of 1901 was adopted must continue 'inviolate,'" the pertinent question "is not whether [the right] still exists under the statute, but whether it still remains inviolate."[116]

---

108. *E.g.*, Kansas Malpractice Victims v. Bell, 757 P.2d 251, 258-59 (Kan. 1988).

109. Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986).

110. *Kansas Malpractice Victims*, 757 P.2d at 259. For example, workers' compensation statutes are constitutional because the legislation provides an adequate *quid pro quo* to both the employer and the employee. The employee is liable regardless of fault, but, in return, there is a limit placed on the amount the employee can recover. The employee gives up the right to recover damages above the set limit but no longer has to prove negligence by the employer. Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976).

111. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 163 (Ala. 1991).

112. 771 P.2d 711 (Wash. 1989).

113. WASH. CONST. art. I, § 21.

114. *Sofie*, 771 P.2d at 722 (alterations in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1976)).

115. *Id.* (emphasis added).

116. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 163-64 (quoting Alford v. State ex rel. Att'y Gen., 54 So. 213, 218 (Ala. 1910) (alterations in original)

The court determined that an essential function of the jury, since the time the Alabama constitution was adopted, has been to assess the amount of damages. Accordingly, the court concluded that the statutory limitation impairs this essential function such that the right would no longer be "inviolate."[117]

The leading case upholding a damages cap in the face of a right to jury trial challenge is *Etheridge v. Medical Center Hospitals*.[118] The *Etheridge* court acknowledged the jury's role in assessing damages, but limited the role to the initial determination. It is then the duty of the court to apply the law.[119] The court articulated this rationale as follows: "A trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function. Thus, . . . [the damages cap] does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process."[120] The *Sofie* court pointed out the absurdity of this line of reasoning, contending that the approach in *Etheridge* places form over substance: "In other words, a constitutional protection cannot be bypassed by allowing it to exist in form but letting it have no effect in function."[121]

IV. POSSIBLE CHALLENGES TO ALASKA STATUTES SECTION 09.17.010

A. Equal Protection

As discussed earlier,[122] courts often wrestle with which level of scrutiny to apply in equal protection challenges. Alaska courts, however, are unconcerned with pigeonholing their analysis into one of the three levels of scrutiny. Instead, they apply a single, uniform analysis in evaluating equal protection claims.[123] Thus, "'by avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis

---

(Mayfield, Sayre, & Evans, JJ., dissenting)).

117. *Id.* at 164.

118. 376 S.E.2d 525 (Va. 1989), *cited with approval in* Murphy v. Edmonds, 601 A.2d 102, 117 (Md. 1992); *see also* Boyd v. Bulala, 877 F.2d 1191, 1195-96 (4th Cir. 1989).

119. *Etheridge*, 376 S.E.2d at 529.

120. *Id.*

121. *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 724 (Wash. 1989).

122. *See supra* part III.A.

123. *See generally* Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1 (1986).

may be made.'"[124]

Alaska's "sliding scale" approach to equal protection challenges resembles a due process balancing test. The Alaska Court of Appeals described this sliding scale analysis as follows: "[T]he more significant the individual right infringed, the more strictly this court will scrutinize the legitimacy and importance of the state's purpose and the link between that purpose and the statutory means to effectuate it."[125] The first step in the analysis, therefore, is to determine the importance of the individual right involved.[126] The Alaska Supreme Court has identified the right to redress wrongs through the judicial process as "significant."[127] Accordingly, because the damages cap in Alaska prevents full redress for certain wrongs, the statute would presumably be scrutinized more closely than a regulation of an economic interest.[128]

Even in cases towards the lower end of the sliding scale, the Alaska courts have scrutinized legislation more closely than the traditional rational basis test requires. The Alaska Supreme Court has commented, "We are in agreement with the view that the [U.S.] Supreme Court's recent equal protection decisions have shown a tendency towards less speculative, less deferential, more intensified means-to-end inquiry when it is applying the traditional rational basis test and we approve of this development."[129] Strict scrutiny is also warranted because Alaska's equal protection clause provides broader protection in all areas than the Federal Equal Protection Clause.[130]

The Alaska Supreme Court has articulated its modified rational basis test as follows: "[I]n order for a classification to

---

124. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 437 n.38 (Alaska 1979) (quoting State v. Erikson, 574 P.2d 1, 12 (Alaska 1978)).

125. Burnor v. State, 829 P.2d 837, 839 (Alaska Ct. App. 1992). In particular, the sliding scale approach—in flexibly weighing the significance of the individual right involved with the degree of scrutiny to be applied—is strikingly similar to the due process analysis employed by the Utah Supreme Court in Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989), *see supra* notes 78-90 and accompanying text, and by the Ohio Supreme Court in Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991), *see supra* notes 91-100 and accompanying text.

126. *See* Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983) (dictum).

127. *Id.* at 572.

128. *See id.* (noting that economic interests "have traditionally been afforded minimal protection under equal protection analyses"). The right imperiled by the damages cap is more analogous to the right to redress wrongs through the judicial process than to "the interest in recovering from a 'deep pocket,'" which the Alaska Supreme Court has declared to be only an economic interest. *Id.*

129. Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976).

130. Burnor v. State, 829 P.2d 837, 839 (Alaska Ct. App. 1992).

survive judicial scrutiny, the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'"[131] This standard is *identical* to the heightened scrutiny test that other courts have employed in striking down damages caps.[132] It is also essentially the same as the intermediate standard that the United States Supreme Court applies to classifications based upon illegitimacy or gender.[133]

By contrast, all courts that have upheld damages caps have applied a lower level of scrutiny. For example, the Colorado Supreme Court in *Scholz v. Metropolitan Pathologists, P.C.*,[134] held that a cap was constitutional "so long as it is reasonable and bears a rational relationship to a legitimate state objective."[135] Similarly, the Virginia Supreme Court required only that the legislation be reasonably related to a legitimate government purpose.[136] Therefore, whatever one chooses to label it, the standard of review that will be applied to the cap on noneconomic damages in Alaska will more closely approximate the rigorous test applied by those courts that have rejected such provisions. When an intermediate level of scrutiny is applied, it is extremely unlikely that a damages cap would pass scrutiny.[137]

When Alaska Statutes section 09.17.010 is challenged, the inquiry will be whether the cap bears a fair and substantial relation to the purpose it seeks to advance "when examining intensively the means used and the reasons advanced therefor."[138] Thus, it will be necessary to inquire into the effectiveness of the statute in reducing the amount paid in personal injury claims and in lowering

131. State v. Wylie, 516 P.2d 142, 145 (Alaska 1973) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

132. *See, e.g.*, Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991) (striking down $875,000 limitation for noneconomic loss in personal injury action); Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (striking down $250,000 limitation for noneconomic damages in medical malpractice action).

133. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 265 (1979); Reed v. Reed, 404 U.S. 71, 76-77 (1971).

134. 851 P.2d 901 (Colo. 1993).

135. *Id.* at 906.

136. Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

137. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991); Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993); Pfost v. State, 713 P.2d 495 (Mont. 1986), *overruled on other grounds by* Meech v. Hillhaven W., Inc., 776 P.2d 488 (Mont. 1989); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Trujillo v. City of Albuquerque, 798 P.2d 571 (N.M. 1990); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

138. Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976).

liability insurance rates. This inquiry will almost certainly render the statute unconstitutional.

The plaintiff challenging the statute will be able to make two strong arguments. First, the challenger will be able to point to studies indicating that damages caps have not led to lower insurance rates in other jurisdictions.[139] Second, the plaintiff will be able to argue that, irrespective of what any statistics reflect, the statute will be ineffective in lowering liability insurance rates. Plaintiffs only rarely receive awards for noneconomic damages in excess of the $500,000 cap.[140] Moreover, the exception for cases of disfigurement or severe physical impairment makes the cap applicable in even fewer cases. The remaining cases subject to the cap are highly unlikely to bring about a change in the liability insurance industry. "Benefit to the public may be a rational basis for a discriminatory classification, but the more speculative and remote the benefit, the more arbitrary, is the discrimination."[141] Thus, the cap does not meet the requirements of Alaska's rational basis test that the statute have "a fair and substantial relation to the object of the legislation."[142] Moreover, the fact that the cap applies so infrequently makes the statute extremely arbitrary. It is therefore doubtful whether the damages cap provision could pass

---

139. *See, e.g.*, AMERICAN BAR ASS'N, SPECIAL COMM. ON MEDICAL PROFESSIONAL LIAB., PROFESSIONAL LIABILITY AND HEALTH CARE REFORM 16 (1993) (concluding that "[h]ealth care costs approximately doubled from 1982 to 1990 regardless of whether a state had enacted tort 'reforms' and regardless of the types of 'reforms' enacted") (citing GENERAL ACCOUNTING OFFICE, HEALTH CARE SPENDING - NONPOLICY FACTORS ACCOUNT FOR MOST STATE DIFFERENCES (1992)); *see also* Paul Zwier & Dean Piermattei, *Who Knows Best About Damages: A Case for Courts' Rights*, 93 DICK. L. REV. 689 (1989); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989).

140. The author was able to locate only four such cases in Alaska since the cap was enacted in 1986. *See* Vanderpool v. Red Devil Corp., No. 4BE-91-178 Ci. (Alaska Super. Ct. Sept. 24, 1993); Pleasant v. Navistar Int'l Transp. Corp., No. 4BE-88-007 CIV. (Alaska Super. Ct. Jan. 27, 1993); Balch v. Pierce-Pacific Mfg., Inc., No. A87-464 CIV (D. Alaska Apr. 12, 1991) ($1,484,000 award not reduced because claim accrued before 1986); Heflin v. United States, No. A87-182 CIV (D. Alaska Apr. 1989) ($1,134,000 award not reduced because claim accrued before 1986); *see also Carson*, 424 A.2d at 836 (holding that $250,000 cap on noneconomic damages did not substantially advance State's goal because there are so few awards that exceed this amount and because paid-out damage awards constitute only a small part of total insurance premium costs).

141. Butler v. Flint Goodrich Hosp., 607 So. 2d 517, 523 (La. 1992) (Calogero, C.J., dissenting), *cert. denied*, 61 U.S.L.W. 3771 (U.S. May 18, 1993) (No. 92-1487).

142. State v. Wylie, 516 P.2d 142, 145 (Alaska 1973).

the part of the rational basis test requiring that the statute be "reasonable not arbitrary."

The Alaska Supreme Court also has made it clear that it will not defer to the legislature on the issue of the statutes' effectiveness in achieving their intended objectives. In *Turner Construction Co. v. Scales*,[143] the court stated that when it considers whether the statute substantially furthers the purpose of the State, it refuses to "hypothesize facts which would sustain otherwise questionable legislation."[144] Thus, the Alaska Supreme Court will not uphold the damages cap if there is evidence that shows that the limitation will not reduce liability insurance rates.

The holding of the Alaska Supreme Court in *Keyes v. Humana Hospital Alaska, Inc.*,[145] provides particularly useful insight into how the court might rule on an equal protection challenge to Alaska Statutes section 09.17.010. The *Keyes* court upheld a statute[146] that requires pre-trial review of medical malpractice claims by an expert advisory panel and that makes the written report of the panel admissible as evidence at the trial.[147] In rejecting the equal protection claim, the court applied a relatively low level of scrutiny under its "sliding scale" approach and stated that "a conclusion that [the statute] bears a fair and substantial relation to its purposes is unavoidable *absent some showing by [the plaintiff] that the statute is unlikely to encourage settlement and reduce litigation over malpractice claims.*"[148] The court explained why it was appropriate for the plaintiff to bear this burden:

> [I]t is inappropriate for a court to preclude the legislature from attempting to resolve a problem in a particular manner simply because the intended results cannot be definitively demonstrated in advance. . . . The "fair and substantial relation" test is met, in a situation where the problem sought to be resolved is unique and the possible techniques for its solution are therefore untested, where the available evidence suggests the soundness of the theory. The burden is upon those who attack the legislation in such a case to show that it will not likely accomplish its goal.[149]

---

143. 752 P.2d 467 (Alaska 1988).

144. *Id.* at 471-72 (holding that six-year statute of repose on suits against design professionals violated the equal protection clause of Alaska because the statute was not substantially related to State's goal of encouraging construction).

145. 750 P.2d 343 (Alaska 1988).

146. ALASKA STAT. § 09.55.536 (1983).

147. *Keyes*, 750 P.2d at 351-55.

148. *Id.* at 358 (emphasis added).

149. *Id.* at 358 n.31 (quoting Attorney Gen. v. Johnson, 385 A.2d 57, 79 (Md. 1978)).

At first blush, the *Keyes* opinion looks like an obstacle to an equal protection challenge to the damages cap in Alaska. The court applied a "relatively low level of scrutiny," placed the burden on the plaintiff to demonstrate the ineffectiveness of the statute and ultimately held that the statute was constitutional.[150] In fact, however, the *Keyes* ruling will advance the cause of a litigant who presents evidence of the statute's ineffectiveness. Although the *Keyes* court placed the burden of proof on the party challenging the statute, it nevertheless indicated its willingness to review evidence that the statute was ineffective.[151] The court upheld the statute, however, because the plaintiff failed to advance such an argument. The willingness of the court to entertain this type of examination into the effectiveness of the statute is encouraging to potential challengers of the damages cap because it is the same kind of inquiry that has led so many other courts to strike down damages-limiting provisions.[152] It is only when a court refuses to conduct such an inquiry that damages caps have been upheld.[153] Therefore, a litigant challenging Alaska Statutes section 09.17.010 on equal protection grounds will be afforded the opportunity to make a factual showing that the $500,000 cap is not substantially related to the objective of the statute, and there is ample evidence to draw upon in making such a challenge.

In its defense of the damages cap, the State is also likely to argue that, given the exception for victims of disfigurement or severe physical impairment, meritorious claims will be unaffected and only unjustifiably high awards will be controlled. As the New Hampshire Supreme Court has pointed out, however, "society, through the courts, has developed a remedy to secure itself from the ills of a 'run-away' jury that has imposed a disproportionately high award. That remedy is remittitur, to be exercised in the sound discretion of the trial court."[154] Moreover, whereas a damages

---

150. *Id.* at 358.

151. *Id.*

152. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 165-70 (Ala. 1991).

153. *See, e.g.*, Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

154. Brannigan v. Usitalo, 587 A.2d 1232, 1237 (N.H. 1991). "Remittitur" is defined as "[t]he procedural process by which an excessive verdict of the jury is reduced." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990). The Alaska Supreme Court has held that remittitur of a jury verdict is appropriate where "it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law." Beaulieu v. Elliott, 434 P.2d 665, 676 (Alaska 1967).

cap operates automatically, affecting both meritorious and unjustifiable jury awards, a remittitur is determined on a case-by-case basis and is limited to instances in which the jury award is not supported by the evidence.[155] Additionally, when a remittitur is ordered, the plaintiff can still exercise the option of a new trial;[156] no such alternative exists when a damages cap is applied. Therefore, a judicially-mandated remittitur is better suited to control unjustifiably high damages awards than a legislative damages limit.

In defending Alaska's damages cap, the State will likely attempt to distinguish it from legislative damages limits that have been invalidated in other jurisdictions. Alaska's cap applies only to noneconomic damages, thereby allowing full recovery for all pecuniary damages. As the Florida Supreme Court noted in striking down a $450,000 limit on noneconomic damages, however, "[t]he right to redress of any injury does not draw any distinction between economic and noneconomic damages."[157] Moreover, the Washington Supreme Court has stated that beyond determining issues of fact, "the jury's role in determining noneconomic damages is perhaps even more essential."[158] The significance of non-economic damages has also been noted by the Alabama Supreme Court, which declared them to be "that species of damages lying most peculiarly within the jury's discretion."[159]

Additionally, because the $500,000 limit is higher than many other caps, the State may argue that the restriction on individual rights is less severe than other damages caps. That fewer people are affected by the cap, however, does not make it constitutional. Indeed, such an argument can be turned on its head. When a cap applies to only a handful of victims it becomes potentially even more arbitrary. As explained by the New Hampshire Supreme Court:

> The defendants also argue that *Carson* is distinguishable because the damages cap of $875,000 is three and one-half times as high as the $250,000 cap at issue in *Carson*. The $875,000 cap, they assert, is constitutional because it would burden the rights of fewer tort claimants than the $250,000 cap. . . . Although fewer tort plaintiffs would be affected by a $875,000 cap than by a cap of $250,000, it seems to us even more "unfair and unreasonable to impose the burden of supporting the [insurance] industry solely upon those persons who are [even more] severely injured

155. *See* Sofie v. Fibreboard Corp., 771 P.2d 711, 721 (Wash. 1989).

156. Exxon Corp. v. Alvey, 690 P.2d 733, 742 (Alaska 1984).

157. Smith v. Department of Ins., 507 So. 2d 1080, 1087 (Fla. 1987).

158. *Sofie*, 771 P.2d at 717.

159. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 163 (Ala. 1991) (citations omitted).

> and therefore [even more] in need of compensation." Moreover, if the "fair and substantial relation" test could not be met because "few individuals suffer non-economic damages in excess of $250,000," we fail to understand how a cap of $875,000 could meet the test simply because even fewer individuals would be affected by the higher cap.[160]

Another argument the State will likely advance is that Alaska's damages cap is more equitable than statutes of other states because it contains an exception for the "severely" injured. Although plausible in theory, in practice the exception has not worked. As discussed in part II, courts have struggled with the question of when the exception should apply. The outcomes have been inconsistent and unpredictable.[161] If anything, because of its uncertainty, the exception makes the statute even more arbitrary.

As this discussion reveals, and as one commentator has noted regarding Alaska's "sliding scale" equal protection analysis, "the Alaska Supreme Court has provided attorneys in Alaska with a broad and powerful litigation tool for challenging state and local government classifications."[162] Therefore, when the Alaska Supreme Court finally evaluates the state's damages cap, the equal protection claim should provide a formidable challenge to the constitutionality of the statute.

B. Right to Jury Trial

Article I, section 16 of the Alaska Constitution secures the right to trial by jury in civil suits. This provision reads:

> In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict of not less than three-fourths of the jury and, in courts not of record, may provide for a jury by not less than six or more than twelve.[163]

Additionally, Rule 38(a) of the Alaska Rules of Civil Procedure states, "The right of trial by jury as declared by section 16 of article I of the constitution, or as given by statute of the state, shall be preserved to the parties inviolate."[164]

When Alaska adopted its constitution in 1959, the right to have a jury determine the amount of damages in a tort action was part

---

160. Brannigan v. Usitalo, 587 A.2d 1232, 1236-37 (N.H. 1991) (alteration in original) (quoting Carson v. Maurer, 424 A.2d 825, 836-37 (N.H. 1980)).

161. *See supra* part II.

162. Wise, *supra* note 123, at 2.

163. ALASKA CONST. art. I, § 16.

164. ALASKA R. CIV. P. 38(a).

of the common law.[165] The amount a jury could award under the law was not statutorily limited, as the jury's determination of damages could be reduced only by court-ordered remittitur. The court has never addressed the constitutionality of a provision that places a limit on the amount a plaintiff may receive. As indicated in prior discussion,[166] if the Alaska Supreme Court evaluates a right to jury trial challenge to Alaska Statutes section 09.17.010, the decision would probably turn on whether the court believes the damages remedy is a matter of law or a matter of fact.

One way a court can uphold a damages cap when faced with a right to jury trial challenge is to hold that the legislature has provided an adequate substitute remedy for the right infringed, or a *quid pro quo*.[167] In *Alaska Structures, Inc. v. Alaska Totem Electric Enterprises, Inc.*,[168] the Alaska Supreme Court demonstrated its willingness to consider a *quid pro quo* as justification for limiting a plaintiff's workers' compensation claim. The court stated:

> In accomplishing the goal of securing adequate compensation for injured employees without the expense and delay inherent in a determination of fault as between the employee and the employer, the legislature apparently also found it necessary to limit the total amount of the employer's liability to the statutory award. We have concluded that there is a fair and substantial relationship between the legislative objective of providing guaranteed, expeditious compensation to the injured employee and the limitation on the employer's total liability . . . .[169]

Although the right to jury trial was not at issue in *Arctic Structures*, the case may indicate a receptiveness of the Alaska Supreme Court to a *quid pro quo* defense asserted in response to a right to jury trial claim. Even if the court was willing to consider such a defense, though, the State would still have to show that the damages limitation provides an additional remedy to compensate for the impairment to the right to jury trial, again facing the difficult task of establishing public benefits from such a provision.[170]

---

165. The Alaska Supreme Court has held that when part of the relief sought is compensatory and punitive damages, the Alaska Constitution guarantees the right to a jury trial. Loomis Elec. Protection, Inc. v. Schaefer, 549 P.2d 1341, 1344 (Alaska 1976). Additionally, the Alaska Supreme Court has stated that "[t]here has always been a strong policy favoring jury trials in Alaska." *Id.* at 1344 n.16.

166. *See supra* part III.C.

167. *See supra* note 110 and accompanying text.

168. 605 P.2d 426 (Alaska 1979).

169. *Id.* at 437.

170. *See supra* notes 139-144 and accompanying text.

In addition to the *quid pro quo* rationale, a court may uphold a damages cap that allegedly violates the right to jury trial by holding that a remedy is a matter of law. If a remedy is considered a matter of law, then a damages cap would be constitutional because "[a] trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function."[171] As previously discussed,[172] though, this line of reasoning has been widely criticized for placing form over substance. It allows the jury to make a factual determination which the courts will ignore in some cases. "Such an argument pays lip service to the form of the jury but robs the institution of its function."[173] Moreover, when a damages cap is applied, the determination of the jury is less than advisory, and, unlike a remittitur, the plaintiff does not have the option of asking for a new trial.

In *Keyes v. Humana Hospital Alaska, Inc.*,[174] the Alaska Supreme Court rejected a right to jury trial claim, in addition to the previously mentioned equal protection challenge.[175] The plaintiff in *Keyes* argued that allowing the written report of a medical expert panel into evidence at the trial violated her right to a jury trial because the jury would give too much weight to the panel's report.[176] The court held that the report was analogous to an expert opinion that the jury could evaluate just as it weighed the rest of the evidence in the case.[177] The jury still remained the ultimate arbiter of the issues of fact.[178]

Justice Burke, however, dissented from the *Keyes* opinion and would have invalidated the pretrial screening panel as a violation of the right to a jury trial. Justice Burke stated that jurors might give undue deference to the report of the panel because they might perceive the opinions expressed in the report to be those of the court.[179] Furthermore, Justice Burke rejected the majority's contention that the report simply functioned as another expert witness: An expert witness is subjected to cross-examination, whereas the report is not.[180] In concluding his dissent, Justice Burke wrote:

---

171. Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989).
172. *See supra* text accompanying notes 119-121.
173. Sofie v. Fibreboard Corp., 771 P.2d 711, 721 (Wash. 1989).
174. 750 P.2d 343 (Alaska 1988).
175. *See supra* text accompanying notes 145-152.
176. *Keyes*, 750 P.2d at 346.
177. *Id.* at 346-47.
178. *Id.* at 347.
179. *Id.* at 360 (Burke, J., dissenting).
180. *Id.* at 361 (Burke, J., dissenting).

> If juries are incapable of making rational decisions in medical malpractice cases based upon the evidence placed before them by the parties, then the flaw is in the jury system itself, and it is the Constitution, not the rules of civil procedure, which must be changed. In the meantime, *we are sworn to protect the constitutionally guaranteed right to trial by jury against any scheme designed to frustrate its utilization or undermine its purposes.*[181]

Although Justice Burke is no longer on the court, given the strength of this language in defense of the right to a jury trial, his dissent in *Keyes* could provide the rationale for a future invalidation of the damages cap in Alaska.

Such a reversal of the damages cap would be consistent with the common law right to jury trial. If the Alaska Supreme Court refuses to strike down Alaska Statutes section 09.17.010, the right to jury trial will be different from that right as it existed at common law. Alaska Statutes section 09.17.010 does not allow a jury to determine damages for catastrophically injured plaintiffs; there was no such limitation at common law. Therefore, in order to preserve the right to jury trial "to the same extent as it existed at common law,"[182] the cap must be struck down.

V. CONCLUSION

When the Alaska Supreme Court faces a challenge to the constitutionality of Alaska Statutes 09.17.010, the court's determination will hinge on its assessment of the equal protection and jury trial rights. As noted, Justice Burke's dissent in *Keyes* contains compelling language which defends the importance of the right to jury trial.[183] Justice Burke reasoned that the role of the courts was to "protect the constitutionally guaranteed right to trial by jury against any scheme designed to frustrate its utilization or undermine its purpose."[184] If the court accepts this view of its role, it will strike down the damages cap.

Even if the court were to find that the cap did not violate the right to jury trial, it would likely strike the limitation down on equal protection grounds. Alaska's "sliding scale" analysis, coupled with the Alaska Supreme Court's recognition that the right to redress wrongs through the judicial process is "significant," will make it extremely difficult for the damages-limiting statute to survive judicial scrutiny. Additionally, the confusion and incongruity of outcomes that the legislation has engendered among the lower courts can only add to the challenge that the State will face in

181. *Id.* (emphasis added) (Burke, J., dissenting).
182. ALASKA CONST. art. I, § 16.
183. *Keyes*, 750 P.2d at 361.
184. *Id.*

defending the statute. The cap is not substantially related to reducing the cost of liability insurance, and it is arbitrary. Indeed, it is the arbitrary nature of the statute that makes it so unfair. As a former Chief Justice of the California Supreme Court commented:

> The idea of preserving insurance by imposing huge sacrifices on a few victims is logically perverse. Insurance is a device for spreading risks and costs among large numbers of people so that no one person is crushed by misfortune. In a strange reversal of this principle, [a] statute [limiting damages] concentrates the costs of the worst injuries on a few individuals.[185]

Until Alaska's damages cap is overturned, the handful of victims who have suffered the most severe injuries will continue to bear the burden for the rest of society in a fruitless and illogical experiment to lower insurance rates.

Kevin Sean Mahoney

185. Fein v. Permanente Medical Group, 695 P.2d 665, 690 (Cal. 1985) (Bird, C.J., dissenting), *appeal dismissed*, 474 U.S. 892 (1986).